Supreme Court, U.S.
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No. 03-9659

IN THE
Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES and COMMON CAUSE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African-Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Johnson v. California*, 540 U.S. ___ (2004), and in the prior proceedings in this case, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

advocacy. The League is organized in one thousand communities and in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution — all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror, and in the earlier proceedings here, *Miller-El*, 537 U.S. 322.

Common Cause, Inc. was founded in 1970 as a nonpartisan advocacy organization that seeks to further the public interest. Common Cause has 250,000 members and supporters across the country and has organizations in 38 states, with a national office in Washington, DC.

Common Cause has worked throughout its 34-year history to ensure that the processes of government in all three branches are fair, open, and accountable to the public. It believes that racial discrimination in the selection of a jury, one of the fundamental processes of government, undermines our system

of justice and, more broadly, the underpinnings of our democratic form of government.

ARGUMENT

These *amici* filed a brief as *amici curiae* in this case on May 28, 2004 supporting review of the ruling below.[2] In that brief, we said:

> *Amici* urge the Court both to grant *certiorari* in this case, and also ultimately to grant Miller-El relief in his favor.
>
> *Batson v. Kentucky* and this Court's earlier decision in the present case, *Miller-El v. Cockrell*, required courts to give genuine attention to cleansing the criminal justice process of the taint of racial discrimination in jury selection. The response of the Fifth Circuit panel on remand in this matter, however, was to articulate new formulas — hardly differentiable from the old ones that this Court condemned — that excused patent race-based exclusion of an entire group of citizens from jury service.
>
> The decision below constitutes a dangerous precedent that can only invite cynicism and disrespect for the law. Despite clear guidance from this Court about the relevance of Miller-El's evidence of discrimination and the proper way of analyzing it, the court below conducted an analysis that dismisses, miscasts, and minimizes that evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone, proves discrimination.

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[2] LDF previously had submitted a brief as *amicus curiae* in support of Petitioner Miller-El when this matter was previously before this Court, *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

The result is that the panel dismissed proof of discrimination which can be characterized only as *undeniable*. The historic and continuing racially biased jury-packing behavior of the prosecutors in Miller-El's case was not at all subtle or discreet; it was open and notorious. Despite this Court's explicit directive to consider it, the panel substituted a curt dismissal of that history as inconsequential for its earlier view that it was irrelevant. As wrong as this was in Miller-El's case, it also signals the failure of the panel to comprehend this Court's determination to end racial bias in jury selection. The only way to put the history of racial discrimination in criminal justice behind us in this country is to acknowledge its reality and remedy its wrongs insofar as those remain correctable, not to write it off as insignificant.

Amici urge this Court to grant review and to reverse the decision below, which perpetuates racial discrimination by turning a blind eye to its manifest reality. Racial discrimination in the selection of juries injures not only the defendant and the African-American (or other) citizens who are excluded from service, but the entire community and the very authority of government. Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. If courts condone glaring racial discrimination in the courtroom, they teach the inevitable lesson that law is insincere or inept in its repeated avowals to afford equal justice to all.

When citizens of a defendant's race are disproportionately excluded from serving on his jury by the government officials prosecuting him, a legitimate perception of injustice arises. That perception cannot be dispelled by a perfunctory judicial review of his complaint of discrimination that inquires merely — as the panel did below — whether the prosecutors' articulated justifications

for excluding each individual minority juror, viewed out of context, are plausible. A more critical examination of the prosecutors' actions, which considers all probative information about the circumstances of their exclusionary behavior and the record of the actors engaging in it, is essential. This Court said as much in Miller-El's case last Term, and it should grant review again to make clear that it meant what it said.

The proof of racial discrimination in this case is as strong as courts are ever likely to see. *Amici* urge the Court to send an unequivocal message to the lower courts that such discrimination violates *Batson* and will not be tolerated.

(Brief of the NAACP Legal Defense and Educational Fund,d Inc., League of Women Voters of the United States and Common Cause, Inc. as *Amici Curiae* in Support of Petitioner, at 3-5 [footnote omitted].)

That brief exposed the fundamental legal error that the court below committed when it discarded the compelling evidence presented by Petitioner showing that prosecutors in Dallas County, Texas — where he was tried — regularly and repeatedly used peremptory strikes, in the years prior to his trial, to remove African-American prospective jurors from criminal trial panels. *See id.* at 5-11. It also catalogued the overwhelming evidence of prosecutors' misuse of peremptory strikes for the same purpose at Miller-El's trial, a showing that the court below could ignore or discount only by fashioning and applying "impossibly high — and erroneous — legal standards for proof of discrimination" (*id.* at 15). *See id.* at 11-17.

Amici respectfully urge this Court to review their earlier brief on the Petition in this matter as it considers the questions now before it on the merits, and to reverse the judgment below.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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